



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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OCT 22 2019

Mr. Dan Fruhling, President  
Fruhling Sand & Topsoil, Inc.  
7524 NE 175<sup>th</sup> Street  
Kenmore, WA 98028-3596

Agreed Order Docket No.	16479
Site Location	1010 228 <sup>th</sup> Street SW Bothell, WA 98021

Re: Agreed Order

Dear Mr. Fruhling:

Enclosed is a copy of the signed and effective Agreed Order number 16479. The enclosed Order may not be appealed. The Order is effective as of October 18, 2019.

Note that the Ecology contact listed in this Agreed Order, Jacob Carnes, will no longer be in this role as of October 25, 2019. If you have any questions concerning the content of the document, please contact Jerry Shervey at (425) 649-7293 or [gshe461@ecy.wa.gov](mailto:gshe461@ecy.wa.gov).

Sincerely,

Rachel McCrea  
Water Quality Section Manager  
Northwest Regional Office  
Washington State Department of Ecology

Enclosure: Agreed Order No. 16479

By Certified Mail No.: 9171 9690 0935 0204 6821 77

cc: Central Files, Fruhling Sand & Topsoil, Inc., Sand and Gravel General Permit No. WAG503168, WQ 6.4

ec: Gerald Shervey, Ecology  
Jacob Carnes, Ecology  
Gretchen Onstad, Ecology  
Stacy Patterson, Farallon Consulting, [spatterson@farallonconsulting.com](mailto:spatterson@farallonconsulting.com)  
Daniel Fruhling, Fruhling Sand & Topsoil, [59rockman@gmail.com](mailto:59rockman@gmail.com)  
Larry Carron, Fruhling Sand & Topsoil, [larry@fruhlinginc.com](mailto:larry@fruhlinginc.com)  
Douglas Morrison, Miller Nash Graham & Dunn LLP, [douglas.morrison@millernash.com](mailto:douglas.morrison@millernash.com)



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

IN THE MATTER OF AN	)	AGREED ORDER
ADMINISTRATIVE ORDER	)	DOCKET NO. 16479
AGAINST:	)	
FRUHLING SAND & TOPSOIL, INC.	)	
MR. DAN FRUHLING	)	

To: Mr. Dan Fruhling, President  
Fruhling Sand & Topsoil, Inc.  
7524 NE 175<sup>th</sup> Street  
Kenmore, WA 98028-3596

Agreed Order Docket No.	16479
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**I. INTRODUCTION**

This is an Agreed Order between the Department of Ecology (Ecology) and Fruhling Sand & Topsoil, Inc. (Fruhling) to achieve compliance with Sand and Gravel National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit number WAG503168, RCW 90.48.080, WAC 173-201A-260, and WAC 173-216-040, by taking certain actions which are described below to eliminate discharge from a buried pipe to surface water.

**II. RECOGNITION OF ECOLOGY'S JURISDICTION**

This Agreed Order is issued pursuant to the authority vested in Ecology by the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. sec 1311, et seq. and Chapter 90.48 Revised Code of Washington (RCW).

RCW 90.48.030 provides that Ecology shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, other surface and underground waters of the state of Washington.

RCW 90.48.120 authorizes Ecology to issue administrative orders requiring compliance whenever it determines that a person has violated or created a substantial potential to violate any provision of Chapter 90.48 RCW or fails to control the polluting content of waste to be discharged to waters of the state.

Fruhling agrees to undertake all actions required of it by the terms and conditions of this Agreed Order and not to contest Ecology's jurisdiction and authority to administer this Agreed Order. Fruhling agrees not to appeal this Agreed Order.

Nothing in this Agreed Order shall in any way relieve Fruhling of its obligations to comply with the requirements of its Permit. Nor shall anything in this Agreed Order limit Ecology's authority to enforce the provisions of the aforementioned Permit. Nothing in this Order will confer or designate compliance with the Model Toxics Control Act, WAC 173-340.

### III. FINDINGS OF FACT

Ecology's determination that a violation has occurred or may occur is based on the following facts.

This Agreed Order is being issued to Fruhling Sand & Topsoil, Inc. (Fruhling) to address a discharge of arsenic contaminated groundwater that is not subject to the monitoring requirements of the facility's Sand & Gravel General Permit number WAG503168 (Permit). The Fruhling facility is a reclaimed mine that recycles asphalt and concrete, and makes topsoil mixes.

The Sand and Gravel NPDES and State Waste Discharge General Permit was issued to all permit applicants on February 17, 2016, with a five-year effective period of April 1, 2016, through March 31, 2021. The Permit WAG503168 authorizes Fruhling to discharge Type 3 stormwater to Crystal Creek at monitoring point MP1, and to ground at monitoring points MP2 and MP3. The Type 3 stormwater discharge is subject to complying with the discharge limits and prohibitions set forth in special condition S1 of the Permit and all other special and general requirements specified in the Permit.

Fruhling Sand & Topsoil, Inc. is located on the site of a former mine that was active from 1952 to 1965. The areas of the site that were mined have been restored to elevations specified in the Department of Natural Resources reclamation permit #10402 and a settling pond in the interior of the mine was back-filled during reclamation. Fill materials have been placed at the site since approximately 1992. Fruhling has participated in Ecology's Voluntary Cleanup Program (VCP), under the Model Toxics Control Act, during two time periods as project numbers NW1665 from 8/16/2006 to 1/7/2008 and NW2657 from 11/20/2012 to 8/17/2018. Elevated levels of arsenic were detected on site in groundwater and surface water during both VCP participation periods. A letter from VCP to Fruhling, dated January 12, 2015, states that elevated levels of arsenic and iron in the groundwater are attributed to reducing conditions caused by degradation of wood placed in the fill materials.

On two separate occasions (2/1/2018 and 3/11/2019), Ecology inspectors have observed an orange residue in the drainage ditch (Photos 1 and 2) and native growth protection area (wetland, in Photos 3 and 4) that drains to Crystal Creek south of the Fruhling facility. The first inspection was unannounced in response to a citizen complaint regarding a groundwater seep discharging discolored water to the ditch and wetland adjoining homeowner properties. The second inspection was conducted by invitation from Fruhling to address violations identified in the first inspection. On May 24, 2019, split sampling was conducted by Fruhling and the Waste Action Project (WAP). Results in Table 1 show that arsenic was detected in the (end-of-pipe) water entering the drainage ditch and in the sediments of the drainage ditch. The total arsenic in the "end-of-pipe" sample exceeds the state and federal human health criteria for surface water (freshwater).

The discharge originates from a conveyance pipe that was originally installed to provide overflow drainage from a settling pond that was used when the site was actively mined, reclaimed, or both. The settling pond has been filled in, but the conveyance pipe remains buried in place. The discharge from the pipe flows to a manhole that discharges into several hundred feet of ditch that empties into a wetland designated as a native growth protection area. The water discharged from the conveyance pipe does not meet the Permit definition of

Type 2 stormwater, Type 3 stormwater, process water, or mine dewatering water, and therefore is not subject to the monitoring requirements or effluent limits of the Permit.

**Table 1: Parameters measured in water and sediment samples at Fruhling on May 24, 2019**

Sample Location	Sample Type	Measured Value (Fruhling)	Measured Value (WAP)
End of pipe	Water	3.87 µg/L (dissolved Arsenic) 14.3 µg/L (Total Arsenic)	4.88 µg/L (dissolved Arsenic) 13.2 µg/L (Total Arsenic)
Drainage Ditch	Sediment	256 mg/Kg-dry (Arsenic) 85.3 wt% (moisture)	217 mg/Kg-dry (Arsenic) 81.6 wt% (moisture)

WAP = Waste Action Project

The water discharged from the buried conveyance pipe to the ditch system on the southwest side of the property and the related accumulation of orange residue violates RCW 90.48.080, WAC 173-201A-260(2b), and WAC 173-216-040.

**RCW 90.48.080: Discharge of polluting matter in waters prohibited.**

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

**WAC 173-201A-260: Natural conditions and other water quality criteria and applications.**

(2) **Toxics and aesthetics criteria.** The following narrative criteria apply to all existing and designated uses for fresh and marine water: ...

(b) Aesthetic values must not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste...

**WAC 173-216-040: Authorization required.**

(1) No waste materials may be discharged from any commercial or industrial operation into waters of the state, or into any municipal sewerage system, nor may waste materials be discharged from any municipal sewerage system into waters of the state, except as authorized pursuant to this chapter, chapter 173-220 or 173-226 WAC.

(2) Any person who constructs or modifies or proposes to construct or modify wastewater facilities must first comply with the regulations for submission of plans and reports for construction of wastewater facilities, chapter 173-240 WAC.



**Photo #1:** Small ditch with orange residue behind 23033 11<sup>th</sup> Ave W, flowing northwest on 2/1/2018 [P1310101.JPG].



**Photo #2:** Orange residue observed in drainage ditch on 3/11/2019 [IMG\_0589.JPG].



**Photo #3:** Orange residue flowed from the drainage ditch (north of 9th Pl W), entered the culvert, and drained to the native growth protection area (south of 9th Pl W) shown here on 2/1/2018 [P1310068.JPG].



**Photo #4:** Orange residue observed in the native growth protection area on 3/11/2019 [IMG\_0587.JPG].

#### **IV. CORRECTIVE ACTIONS**

For the reasons detailed above, and in accordance with RCW 90.48.120, IT IS AGREED that Fruhling shall take the following actions by the dates set forth below. These actions are necessary to satisfy the requirements of RCW 90.48.080, WAC 173-201A-260, and WAC 173-216-040. Fruhling has participated in defining these actions and the dates by which they shall be completed. Fruhling shall also submit permit applications and documents needing approvals from the various government agencies in a timely fashion in order that the dates for the various actions are able to be met.

Fruhling and Ecology are entering into this Agreed Order to address these violations. Fruhling prefers to eliminate the arsenic contaminated groundwater discharge to surface water by either treatment and infiltration, or routing to a sanitary sewer. If these options are not feasible, Fruhling will obtain an individual NPDES permit for discharge. Ecology requests that Fruhling prepare the following deliverables:

- 1) Within 90 days of the execution of this Agreed Order, Fruhling must complete a feasibility study of the three options for source control:
  - A. Treatment and infiltration
  - B. Discharge to sewer
  - C. Individual NPDES Permit
- 2) If the feasibility study determines that option A or B is feasible, then Fruhling must submit, within 120 days of execution of this Agreed Order, a plan and a schedule for implementation of a treatment/infiltration system or sewer discharge connection.
- 3) If the study determines that options A and B are not feasible, then Fruhling must submit, within 180 days of execution of this Agreed Order, a new discharge application for an Individual NPDES Permit that includes a description of the proposed treatment system.
- 4) Upon startup of any treatment or infiltration system, Fruhling must submit an Operations and Maintenance Plan for the system.
- 5) Within 120 days of execution of this Agreed Order, Fruhling must submit a plan and schedule for removal and disposal of the soil layer discolored by orange residue in and near the ditch along the homeowner properties neighboring the mine property.

#### **V. PROGRESS REPORTING**

Fruhling shall immediately notify Ecology of any occurrence which may result in noncompliance with the requirements of this Agreed Order. Such notifications shall state the nature of the potential noncompliance, the reason(s) therefore and the actions taken by Fruhling to address the potential noncompliance.

#### **VI. AMENDMENTS TO THE AGREED COMPLIANCE SCHEDULE**

Amendments to the agreed compliance schedule may be requested for good cause. Extension of the deadline imposed by this Agreed Order is unlikely and will only be granted when requests for extensions are submitted in writing, in a timely fashion, and demonstrate good

cause for granting the extension. Failure to obtain financial assistance in the form of grants or loans shall not be considered good cause.

To be effective, all proposed amendments must be signed by the person with signature authority for each party.

#### **VII. EFFECTIVE DATE**

This Order is effective on the date the agreement has been signed by both parties.

#### **VIII. TERMINATION OF THE AGREED ORDER**

Upon completion by Fruhling of the actions identified in Section IV of this Agreed Order and issuance of a Notice of Compliance by Ecology, the requirements of this Agreed Order shall be deemed to be fulfilled and shall have no further effect on Fruhling.

#### **IX. DISPUTE RESOLUTION**

If a dispute arises between Ecology and Fruhling regarding any noncompliance with this Agreed Order, the parties shall attempt to resolve the dispute by informal resolution. A dispute shall be considered to have arisen when one party notifies another, in writing, that there is a dispute. If the parties cannot resolve the dispute informally within thirty (30) days, Fruhling shall serve on Ecology a written Statement of Position. Within thirty (30) days after receipt of Fruhling's Statement of Position, Ecology shall provide Fruhling with a final administrative decision.

#### **X. ENFORCEMENT**

Failure to comply with this Agreed Order may result in the issuance of civil penalties of up to \$10,000 per day or other actions, whether administrative or judicial, to enforce the terms of this Agreed Order.

#### **XI. THIRD PARTY RIGHT TO APPEAL**

By signing this Agreed Order, Fruhling may not appeal this Agreed Order, however, a third party may.

A party other than Fruhling has a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within thirty (30) days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal, you must do both of the following within thirty (30) days of the date of receipt of this Order:

- File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Your appeal alone will not stay the effectiveness of this Order. Stay requests must be submitted in accordance with RCW 43.21B.320.

## XII. ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
<b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	<b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
<b>Pollution Control Hearings Board</b> 1111 Israel Road SW STE 301 Tumwater, WA 98501	<b>Pollution Control Hearings Board</b> PO Box 40903 Olympia, WA 98504-0903

## XIII. CONTACT INFORMATION


Please direct all questions about this Order to:

Jacob Carnes  
Sand and Gravel Permit Manager  
Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Avenue SE  
Bellevue, WA 98008-5452  
Phone: (425) 649-7289  
Email: carj461@ecy.wa.gov

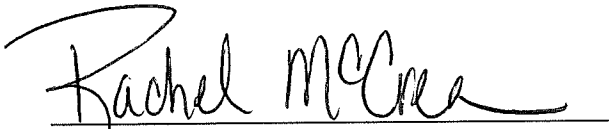
## XIV. MORE INFORMATION

- **Pollution Control Hearings Board Website:** <http://www.eluho.wa.gov/Board/PCHB>
- **Chapter 43.21B RCW - Environmental and Land Use Hearings Office – Pollution Control Hearings Board:** <http://apps.leg.wa.gov/RCW/default.aspx?cite=43.21B>
- **Chapter 371-08 WAC – Practice And Procedure:**  
<http://apps.leg.wa.gov/WAC/default.aspx?cite=371-08>
- **Chapter 34.05 RCW – Administrative Procedure Act:**  
<http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05>
- **Ecology's Laws, rules, & rulemaking website:**  
<https://ecology.wa.gov/About-us/How-we-operate/Laws-rules-rulemaking>

**XV. SIGNATURES**

  
\_\_\_\_\_  
Dan Fruhling  
Fruhling Sand & Topsoil, Inc.

10/15/19  
Date

  
\_\_\_\_\_  
Rachel McCrea  
Water Quality Section Manager  
Northwest Regional Office  
Washington State Department of Ecology

10/18/19  
Date